OF THE

United States

OCTOBER TERM, 1932

FILE
JUN 9 19
CHARLES ELMORE

Nos. 145 to 150

LOUISE A. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5665)

LYDIA L. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5666)

LOUISE A. F. E. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5668)

LYDIA L. I. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5670)

LYDIA LOUISE IDA WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5671)

LOUISE A. F. E. WHITCOMB, *Petitioner*,
vs.
DAVID BURNET, Commissioner of Internal Revenue, *Respondent*. (DCA 5675)

PETITION FOR WRITS OF CERTIORARI
to the Court of Appeals of the District of Columbia
and
BRIEF IN SUPPORT THEREOF.

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In the Supreme Court
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PETITION FOR WRITS OF CERTIORARI
to the Court of Appeals of the District of Columbia.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above named petitioners, pray that writs of certiorari issue to review the judgments of the Court of Appeals of the District of Columbia entered on May 22, 1933, in the six cases between the above named parties, docketed therein as Nos. 5665, 5666, 5668, 5670, 5673 and 5675.

OPINIONS.

The opinion of the Board of Tax Appeals is reported in 22 B. T. A. 118. The opinion of the Court of Appeals of the District of Columbia is not yet reported.

JURISDICTION.

The judgments of the Court of Appeals of the District of Columbia were entered May 22, 1933.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

These cases involve the question presented by the petitions in John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, Deceased, Petitioner, v. David Burnet, Commissioner of Internal Revenue, Respondent, and companion cases, and in Marguerite T. Whitcomb, Petitioner, v. David Burnet, Commissioner of Internal Revenue, Respondent, and companion cases, filed contemporaneously herewith. (Reference is hereby made to these petitions for the sake of brevity.) They also present an additional question. Even if the court below were right in its disposition of the case of Marguerite T. Whitcomb, petitioners' mother, that the funds received by her were distributable from the trust as income and, therefore, taxable, nevertheless these petitioners claim that since they are remaindermen who will succeed to the trust property upon the termination of the trust and the trust property has suffered depreciation, they are entitled in computing their income tax to deduct this depreciation.

STATUTES INVOLVED.

The statutes involved are those mentioned in the accompanying petitions.

STATEMENT.

These petitioners received income for the years 1921 to 1926 under circumstances set forth in the accompanying petitions. These petitioners were remaindermen entitled to succeed on the termination of the trust to one-half of

the trust property. They are the daughters of Adolph Whitcomb. The latter died in 1914 and was the son of A. C. Whitcomb, the original testator.

SPECIFICATION OF ERRORS.

The Court of Appeals of the District of Columbia erred:

(1) In holding that the order of the state court was not conclusive on the question as to what amounts were properly distributable to the beneficiaries of the trust.

(2) In holding that the trustee was not obliged to withhold from distribution a reasonable allowance for depreciation of the improvements and hotel furniture.

(3) In holding that the taxpayers were not entitled in their income tax returns to deduct their share of the depreciation of the trust property.

(4) In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRITS.

The reasons set forth in the accompanying petitions require the granting of writs in these cases also, but in these cases there is this additional ground. The decision of the Court of Appeals of the District of Columbia, while taking no notice of the point, reaches a result contrary to its own expression of the law in the earlier case, *Whitcomb v. Blair*, 58 App. D. C. 104, and is opposed to the decisions of the Circuit Court of Appeals for the Second Circuit in *Merle-Smith v. Commissioner*, 42 F. (2d) 837, and for the Tenth Circuit in *Reynolds v. Cooper*, decided

April 3, 1933, and indeed to the decision of the Circuit Court of Appeals for the Ninth Circuit in the companion cases.

Dated, San Francisco, California,
June 2, 1933.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

For the statement of the case, and also statement as to the opinions below, jurisdiction, question presented, statutes involved and specification of errors, we refer to the foregoing petition and to the petitions and briefs in accompanying cases, to which reference is there made.

ARGUMENT.

Although the opinion below simply assumes that there is no point of difference between these cases of beneficiaries of the trust who are also remaindermen, we must point out the essential distinction. In its earlier decision, *Whitcomb v. Blair,* 58 App. D. C. 104, 105, the lower court held that "capital losses in such cases fell upon the reversioners or remaindermen, and not upon the life tenant". In the companion cases of beneficiaries who were not remaindermen, the Circuit Court of Appeals for the Ninth Circuit held that "the loss then due to depreciation under the record in the present case is borne by the remaindermen in determining the tax" (*Commissioner v. Freuler,* 62 F. (2d) 733). The result reached by the court below in the instant cases, therefore, creates a direct conflict; not only with its earlier decision, but with that of the Circuit Court of Appeals of the Ninth Circuit. Decisions of other courts in accord with the Ninth Circuit are cited in the foregoing petition. Other similar rulings are *Alphin v. Commissioner,* 21 B. T. A. 1101, acquiescence by

Commissioner C. B. X-2, p. 2; G. C. M. 10,273, C. B. XI-1, pp. 169, 172, and G. C. M. 9804, C. B. X-2, p. 353.

Dated, San Francisco, California,
June 2, 1933.

Respectfully submitted,
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